87-1044

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NO.

in the

Supreme Court

of the

United States

October Term, 1987

JESSE HILL,

Petitioner,

vs.

DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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December, 1987

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QUESTION PRESENTED

Whether a state agency's common law sovereign immunity is a defense to a federal civil rights action brought pursuant to 42 U.S.C. §1983 and filed in state court.

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JESSE HILL,

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vs.

DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

The Petitioner, Jesse Hill, respectfully prays that a writ of certiorari issue to review the opinion and

judgment of the Florida Supreme Court, entered in this proceeding September 24, 1987.

OPINIONS BELOW

The opinion of the Florida Supreme Court affirming in part and reversing in part the Florida District Court of Appeal, Third District, is reported at 513 So.2d 129 (Fla. 1987) and is reprinted at pp. A-1 to A-15 of the Appendix to this Petition.

The opinion of the Florida District Court of Appeal, Third District, dated May 6, 1986, is reported at 490 So.2d 118 (1986) and is reprinted at pp. A-16 to A-19 of the Appendix to this Petition.

The opinion of the Florida District Court of Appeal, Third District, on Motion for Rehearing and Certification, dated June 17, 1987, is reported at 490 So.2d 118 (1986) and is reprinted at pp. A-20 to A-21 of the Appendix to this Petition.

The decision of the trial court to dismiss the civil rights action was rendered orally during trial and no written order was entered regarding the dismissal of this count.

JURISDICTION

The Florida Supreme Court issued its opinion on September 24, 1987, affirming the dismissal of the petitioner's civil rights claim by the Florida District Court of Appeal, Third District.

The jurisdiction of this Court to review the opinion and judgment of the Florida Supreme Court is invoked under 28 U.S.C. 1257 (3).

STATUTES INVOLVED

This case involves 42 U.S.C. Section 1983 (1982), which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulations, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This case also involves the Eleventh and Fourteenth Amendments of the United States Constitution, as well as Article III of the Constitution.

The Eleventh Amendment of the United States Constitution provides:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment of the United States Constitution provides in section one:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article III, Section I states:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

STATEMENT OF THE CASE

In March of 1982 Jesse Hill was arrested for having a revolver tucked in his pants, during a domestic dispute with his father while he was in the home in which he was living at the time. [Trial Transcript at page 362, hereinafter abbreviated as follows, T. Tr. 362] The police charged Hill with carrying a concealed firearm. The

Court accepted Hill's plea of guilty to the charge and on June 11, 1982, withheld adjudication and placed Hill on twelve months non-reporting probation. [T. Tr. 379] Non-reporting was a form of probation recognized in Florida in which the individual did not have to report regularly to a probation officer. Non-reporting probation was imposed by Dade County Florida Circuit Judges approximately 8% of the time in 1982. [T. Tr. 251].

On or about January 28, 1983, probation officer in training, Dorothy MacEachern falsely swore to an affidavit of probation violation, claiming Hill had violated various conditions of his order of probation. [T. Tr. 154-160] Consequently, a warrant was issued for the arrest of Hill and he was arrested on February 18, 1983. [T. Tr. 366] Hill was incarcerated for seven and one-half days, before the error was discovered by the trial judge's clerk. [T. Tr. 164] During that time he suffered from severe insomnia, was denied medical care and was shoved by a guard, severely aggravating a pre-existing neck injury. [T. Tr. 368-369] The expert testimony established an additional 5 to 7 percent total disability of the body as a whole as a result of this incident. [T. Tr. 128-131]

This action was initiated by Hill through the filing of a three-count complaint in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida on November 18, 1984. The amended complaint, filed April 2, 1985, sought damages against the Department of Corrections of the State of Florida (DOC), for false imprisonment, negligence and a violation of Hill's civil rights pursuant to 42 U.S.C. Section 1983. [A-2].

During trial, the trial judge dismissed the civil rights action and the case was submitted to the jury on the negligence and false imprisonment claims. [A-2]. The jury found the DOC liable and awarded $750,000.00 in damages.

A timely appeal was filed by the DOC to the Third District Court of Appeal and Hill cross-appealed the dismissal of his 42 U.S.C. Section 1983 civil rights action. [A-19].

The Third District Court of Appeal by opinion filed May 6, 1986 held that the trial court erred in giving the jury a misleading instruction and verdict form. The court affirmed the finding of liability on the state law claims but remanded the case to the trial court for a new trial on damages for false imprisonment. The Court furthermore affirmed the dismissal of the 42 U.S.C. Section 1983 claim on the authority of *Scoblow v. Ameri-Manage, Inc.*, 483 So.2d 809 (Fla. 3d DCA 1986). [A-19].

By opinion filed June 17, 1986 the Third District, on motion for rehearing and certification, certified the following question to the Florida Supreme Court as one of great public importance:

> Has the State of Florida, pursuant to Section 768.28, Florida Statutes (1983), waived its Eleventh Amendment and State common law immunity and consented to suit against the State and its agencies under U.S.C. Section 1983? [A-21].

On September 24, 1987, the Florida Supreme Court approved that portion of the District Court decision dismissing the Section 1983 action due to the defense of state sovereign immunity, but quashed that portion of the decision which ordered a new trial on damages, finding that the use of the verdict form did not constitute fundamental error and that the granting of relief by the Third District on the basis of Fla.R.Civ.Pro. 1.540 was improper. [A-14].

The Florida Supreme Court, in affirming the dismissal of the Section 1983 action, *agreed* with Hill that the Eleventh Amendment immunity to suits granted to the states in federal courts is inapplicable to an action in state court. Nevertheless, the court held that since Congress, by enacting Section 1983, did not intend to abrogate a state's Eleventh Amendment immunity from suits in federal courts, it logically followed that Congress also did not intend to abrogate the states' immunity from Section 1983 actions brought in state court. [A-6].

The Florida Supreme Court found support for this finding in several other state court decisions which essentially held that a state's "traditional" sovereign immunity should not be treated as being abrogated in a federal cause of action filed in a state court without a specific mandate of Congress to that end. The Court does not go into a discussion of what this traditional immunity involved or whether this traditional immunity was applicable in the present case. In addition, the Court did not address the issues of federal law which this case raised. Rather, it reached its decision that the common law immunity of the state of

Florida and its agencies has not been abrogated by 42 U.S.C. Section 1983 without any definitive authority to guide it.

REASONS FOR GRANTING THE WRIT

I.

THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE FLORIDA SUPREME COURT RAISES IMPORTANT ISSUES OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

The decision of the Florida Supreme Court allowing Florida to defeat a Section 1983 action by invoking sovereign immunity, implicates an area of federal law which has not been, but should be definitively settled by this Court.

Over the past few years, state courts have seen a dramatic increase in the number of Section 1983 actions brought in their courts. Although no specific statistics are available, the increase in reported state appellate court opinions suggests that state court Section 1983 actions have become an important remedy. *See* Steinglass, *The Emerging State Court Section 1983 Action: A Procedural Review,* 38 U. Miami L.Rev. 381, 435 (1984).

In *Martinez v. California,* 444 U.S. 277 (1980) and *Testa v. Katt,* 330 U.S. 386 (1947), this Court has stated that state courts enjoy concurrent jurisdiction with the

federal courts to hear a federal constitutional claim. Where a claimant decides to bypass the federal courts and bring a Section 1983 action directly in state court, or where he is barred from the federal courts by the Eleventh Amendment, this Court has held that a state *may* hear the case. *Martinez,* 444 U.S. at 283, n. 7. *See also Lloyd v. Page,* 474 So.2d 865 (Fla. App. 1st DCA 1985) (concluding that Florida courts had concurrent jurisdiction with federal courts to consider actions pursuant to 42 U.S.C. 1983). The Court has, however, never considered the question of whether a state *must* entertain a claim under Section 1983. *Martinez,* 444 U.S. at 283 n. 7.

As a result, state courts have been forced to deal with the unique federal issues which arise when federal claims are filed in state courts. This Court has addressed the issue of state sovereign immunity in federal court actions, deciding that the Eleventh Amendment provides immunity for the states in such instances. *Hans v. Louisiana,* 134 U.S. 1 (1890) (Eleventh Amendment grants states immunity from suit by any person in federal court). However, this Court has yet to develop a framework for examining state restrictions on Section 1983 actions brought in state court. Consequently, state courts have little guidance in this area and have employed various methods of reasoning in reaching their decisions.

Although this Court and several state courts have clearly stated that the Eleventh Amendment is not

applicable to state court actions,[1] the Florida Supreme Court and others have found an analogous immunity which they say is available to states in state courts. *Lowery v. Dept. of Corrections,* 380 N.W. 2d 99 (Mich. App. 1985); *Hampton v. State of Michigan,* 377 N.W. 2d 920 (Mich. App. 1985); *Karchefske v. Dept. of Mental Health,* 371 N.W. 2d 876 (Mich. App. 1985) ("In considering the policy supporting sovereign immunity of the states from liability in their own courts, we find a compelling analogy in the Eleventh Amendment, even though the latter provision on its face governs the federal judicial power.") (footnote omitted).

These state courts which allow a state to invoke sovereign immunity in their own courts rely on the existence of a "traditional" immunity generally enjoyed by states.

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[1] *Uberoi v. University of Colorado,* 713 P.2d 894 (Colo. 1986) (The Eleventh Amendment is simply inapplicable to suits initiated in state courts); *Kristensen v. Strinden,* 343 N.W. 2d 67, 72 n. 4 (N.D. 1983) (No Eleventh Amendment question is present when the action is brought in state court); *Maine v. Thiboutot,* 448 U.S. 1 at 9, n. 7 (1980) (The Eleventh Amendment restrains "only the Judicial power of the United States."); *but see, Pyne v. Meese,* 172 Cal. App. 3d 392, 218 Cal.Rptr. 87, 91 n. 6 (Cal. App. 3d Dist. 1985) (The United States Supreme Court has not yet decided the issue of whether the holding in *Quern* is applicable to actions in state courts, and we are unwilling to find the footnote in *Thiboutot* dispositive.) Thus it is clear that there is a conflict among the states as to whether the Eleventh Amendment immunity in *Quern* is applicable to the states. It is interesting to note that the Florida Supreme Court in the instant case agreed with the petitioner that it was *not,* yet nevertheless still analogized to this Eleventh Amendment immunity and found it applicable to the state court action.

The Connecticut Supreme Court, in *Fetterman v. Univ. of Connecticut,* 473 A.2d 1176 (Conn. 1984), held that sovereign immunity would bar a Section 1983 action brought in state court against the State of Connecticut. In so holding, the court relied upon language in *Owen v. Independence,* 445 U.S. 622 (1980). In *Owen,* this Court stated that "where the immunity claimed by the defendant was well established at common law at the time Section 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity." *Id.* at 638.

In *Karchefske,* the Michigan Court of Appeals stated that it was persuaded to accept this Court's statement in *Quern v. Jordan,* 440 U.S. 332 (1979) that Congress did not intend by the general language of Section 1983 to override the traditional sovereign immunity of the states. *See also, Kapil v. Assn. of Pennsylvania State College, Etc.,* 448 A.2d 717 (Pa. Cmwlth 1982) (a state's traditional sovereign immunity, to the extent that the state has preserved it, would also bar a Section 1983 action in the state's own courts). This reliance on a state's "traditional" immunity may be misplaced when the action is a federally created one.[2]

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[2]The "traditional" sovereign immunity to which these courts refer developed over time. However, as Justice Holmes stated in *Kawananakoa v. Polyblank,* 205 U.S. 349, 353 (1907), "a sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Thus, where the sovereign that makes the laws is not the particular state itself but another sovereign, this rationale is inapplicable. In this case the sovereign making the law is the United States, not the State of Florida and the rationale does not apply.

Similarly, where the purposes behind Section 1983 are inhibited by application of the immunity doctrine, as they are in the instant case, the language of *Owen* is inapplicable.

Similarly, the strong policy reasons which many state courts rely upon to support the existence of a state immunity also tend to be unreliable when dealing with a federal cause of action such as a Section 1983 action. Where an individual has suffered constitutional invasions at the hands of a state, Section 1983 provides a remedy and the public policy behind state immunity will not support the availability of immunity under such severe circumstances.

That the status of the law in this area remains in a state of flux and without direction, is evidenced by the fact that several state courts have not even reached the question of state immunity when presented with a cause of action against a state. Instead, these courts have held that states are not "persons" as contemplated by Section 1983 and therefore are not amenable to suits under the statute. *Gay v. State of Texas,* 730 S.W. 2d 154 (Tex. App. 1987) ("We must conclude, therefore, that appellee, the State of Texas, is not a "person" within the purview of Section 1983 et. seq. and a suit based upon that statute could not be maintained even in the state courts."); *Merritt for Merritt v. State of Idaho,* 108 Idaho 20, 696 P.2d 871 (Idaho 1985) ("We interpret *Quern* . . . as holding that states are not 'persons' for purposes of Section 1983. . . . Thus we affirm the trial court's dismissal . . . on the grounds that the State of Idaho is not a person under 42 U.S.C. 1983").

In deciding that the state of Florida could defeat a Section 1983 action by invoking the doctrine of sovereign immunity, based upon the foundation of traditional immunity and strong public policy set forth in the preceding state court cases, the Florida Supreme

Court has impliedly responded in the negative to the unanswered question in *Martinez* of whether a state court is obligated to hear a federal cause of action.

The states have been addressing these unique federal issues without any guidance from this Court for too long. As the number of state court Section 1983 actions increases, the need for direction and guidance from this Court becomes more pressing.[3] The Court could provide definitive guidelines for all state courts to follow by reviewing the Florida Supreme Court's decision in the instant case, thus insuring a uniform application of the law and precedent in this area.

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[3]This Court has indicated an awareness of this problem by granting a writ of certiorari in the case of *Felder v. Casey*, 139 Wis. 2d 614, 408 N.W.2d 19 (1987), *cert. granted*, 56 U.S. L.W. 3334 (U.S. Nov. 10, 1987) (No. 87-526). That case involved the issue of whether a Section 1983 action would be barred in state court for failure to comply with a state notice of claim statute. The question presented in the instant petition is much broader and has wider implications, in that an affirmation of the Florida Supreme Court's decision would totally foreclose the state court from hearing a Section 1983 claim, even where any applicable notice of claim statute was complied with.

II.

THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE FLORIDA SUPREME COURT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS WHICH REQUIRE A STATE COURT TO APPLY THE ENTIRE SCOPE OF THE FEDERAL LAW WHEN ENTERTAINING A FEDERALLY CREATED ACTION, INCLUDING SECTION 1983 ACTIONS, AND BECAUSE IT RAISES IMPORTANT QUESTIONS OF DUE PROCESS AND THE ROLE OF STATE COURTS.

This Court has long recognized that when an action is brought in a state court to enforce rights or claims under federal law, the Supremacy Clause requires that federal law and policy be applied by the state court. *Maine v. Thiboutot,* 448 U.S. at 11; *Martinez v. California,* 444 U.S. at 284; *Testa v. Katt,* 330 U.S. 386.

In *Garrett v. Moore-McCormack Co.,* 317 U.S. 239 (1942), this Court rejected the application of a state policy which altered rights established under federal law. The Court stated that where a state court action is brought to assert rights granted by federal law, "the state court is bound to proceed in such a manner that *all* the substantial rights of the parties under controlling federal law would be protected." *Id.* at 245 (emphasis added).

In *Brown v. Western Railway of Alabama,* 338 U.S. 294 (1949), involving the dismissal of plaintiff's FELA complaint due to a strict state pleading rule, this Court stated generally that state practices which unnecessarily burden rights arising under federal law must be rejected; "this federal right cannot be defeated by the forms of local practice." *Id.* at 295.

Taking this analysis a step further,

> The suggestion that the act of Congress is not in harmony with the policy of the state . . . is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature and should be respected accordingly in the courts of the State.

Mondou v. New York, 223 U.S. 1 (1912) (holding that the rights arising under the Employer's Liability Act of 1908 may be enforced, as of right, in the courts of the States).

In *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 465 (1975), this Court noted that "considerations of state law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action under consideration." *Id.* at 465.

In *Aitchison v. Raffiani,* 708 F.2d 96 (3d Cir. 1983), the Court stated that in selecting the appropriate statute of limitations the court may not adopt one which is inconsistent with the federal policy underlying the Civil Rights Act.

Finally, the Florida Supreme Court's decision directly conflicts with this Court's holding in *Martinez v. California, supra.* In *Martinez,* this Court refused to allow the defense of state sovereign immunity in a Section 1983 action. In rejecting the application of the state created immunity, this Court emphasized the fact that federal law is controlling.

> Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. Section 1983 . . . cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.

Id. at 284 n. 8 (*quoting Hampton v. City of Chicago,* 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied,* 415 U.S. 917 (1974).

The above cases indicate that a state law or practice must give way to the extent it interferes with or impedes the state court's overriding federal duty to insure that all the substantial rights of the parties under controlling federal law are protected. *Garrett, supra* at 245.

In allowing the defense of sovereign immunity to defeat a Section 1983 claim, the Florida Supreme Court has departed from the reasoning employed by this Court in construing federally created actions, including actions under Section 1983.

This decision also raises some important questions of due process and the role of state courts in the enforcement of federal rights.

Where a claimant is barred from federal courts by the Eleventh Amendment, state court is the only alternative forum available. Thus, the decision of the Florida Supreme Court, which closes the doors of state courts in such actions, raises some basic and serious due process problems.

A basic tenet of the Fourteenth Amendment is that every citizen shall have available to him a forum for the redress of wrongs committed against him. *Boddie v. Connecticut,* 401 U.S. 371 (1971) (involving an indigent's right of access to divorce court). The total foreclosure of any forum, state or federal, for the redress of civil wrongs violates this basic due process guarantee. *Monroe v. Pape,* 365 U.S. 167 (1961) (Frankfurter, J., dissenting). Therefore, where a federal cause of action is barred from federal court by the Eleventh Amendment and is also barred from state court by the state's common law immunity, the claimant is left with no forum in which he can recover against the state. As this Court noted in *General Oil v. Crain,* 209 U.S. 211 (1908),

> If a suit against state officers is precluded in the national courts by the Eleventh Amendment to the Constitution and may be forbidden by a state to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution, and the Fourteenth Amendment, which is directed at state action, could be nullified as to much of its operation.

Id. at 226.

Consequently, where a state is allowed to raise the defense of sovereign immunity to a Section 1983 action, "federalism concerns would be raised because most plaintiffs would have no choice but to bring their complaints concerning state actions to federal courts." *Maine v. Thiboutot,* 448 U.S. at 11, n. 12. Further, where the claim is also barred from the federal courts by the Eleventh Amendment, due process concerns are raised regarding the availability of a forum for redress. *General Oil,* 209 U.S. at 226. Thus, the decision of the Florida Supreme Court, if permitted to stand, encourages a state to adopt policies inconsistent with a plaintiff's right to choose his own forum for redress of Section 1983 violations. It would also have the inevitable result of hindering the emerging development of a state court Section 1983 practice. *See* Steinglass, *The Emerging State Court Section 1983 Action, supra.*

The issue of sovereign immunity as a defense in a state court Section 1983 action also implicates the

original role of state courts in this country's court system. Article III of the Constitution left the existence of lower federal courts entirely to the discretion of Congress. It can therefore be implied that the framers expected state courts of general jurisdiction to always be available as a forum to vindicate federal rights. It is certain that state courts were not free to disregard federal statutory and constitutional rights when they were raised as defenses in a state enforcement proceeding. The framers thus contemplated that state courts would be required to safeguard rights secured by federal law. *See* Note, *Amenability of States to Section 1983 Suits: Reexamining Quern v. Jordan,* 62 Bost. U. L.Rev. 761, 769 (1982).

The decision of the Florida Supreme Court answers a question of federal law which has not yet been addressed by this Court. The answer to this question involves important issues of federalism and due process. Therefore, it is important that this Court review this case to determine whether state courts may erect barriers that force Section 1983 litigation into the federal courts, where they may already be barred.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Florida Supreme Court.

Respectfully submitted,

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Appendix

NO. 69016

Supreme Court of Florida

JESSE HILL,

Petitioner,

vs.

DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA,

Respondent.

Filed September 24, 1987

(Overton, J.) This is a petition to review a decision of the Third District Court of Appeal reported as *Department of Corrections v. Hill,* 409 So.2d 118 (Fla. 3d DCA 1986). The district court certified the following question as one of great public importance:

> Has the State of Florida, pursuant to section 768.28, Florida Statutes (1983), waived its Eleventh Amendment and state common law immunity and consented to suits against the State and its agencies under 42 U.S.C. Section 1983?

Id. at 120. We have jurisdiction. Art. V, §3(b)(4), Fla. Const.

The facts, set out in detail in the district court opinion, reflect that the petitioner in this action, Jesse Hill, filed a complaint against the respondent, Department of Corrections (DOC), alleging false imprisonment, negligence, and a violation of civil rights pursuant to 42 U.S.C. §1983 for the conduct of a probation supervisor in asserting that Hill had violated his probation. The trial court dismissed the civil rights action, but submitted the claims of negligence and false imprisonment to the jury with a special interrogatory verdict. The parties agreed to a specific instruction on the verdict form which read:

> In determining the total amount of damages, do not make any reduction because of negligence, if any of plaintiff Jesse Hill. If you have found Jesse Hill negligent in any degree, the court in entering judgment will reduce Jesse Hill's total amount of damages (100%) by the percentage of negligence which you found is chargeable to Jesse Hill.

Id. at 119. The jury found DOC liable for false imprisonment and 75 percent comparatively negligent, and awarded Hill $750,000 in damages. Reasoning that comparative negligence is not a defense to false imprisonment, the trial court entered judgment for the total amount of damages. DOC, after the time had run for a motion for new trial, sought relief from the asserted erroneous instruction by motion under Florida Rule of Civil Procedure 1.540 which was denied by the trial court.

On appeal, the Third District Court of Appeal affirmed the trial court's dismissal of Hill's section 1983 civil rights claim, reasoning that for purposes of section 1983 the state has not waived its sovereign immunity, and certified that question to this Court; on the rule 1.540 motion, the district court held that the trial court's instruction misled the jury to DOC's prejudice. Although the court found DOC liable for the full amount of any damages caused by false imprisonment, it reversed the cause for a new trial on damages.

Civil Rights Claim

In order to answer the certified question, it is first appropriate to consider the effect of the eleventh amendment on suits filed under 42 U.S.C. §1983. The eleventh amendment to the United States Constitution expressly provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced on or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

This language bars suit by a citizen of one state against another state. The United States Supreme Court, in *Hans v. Louisiana,* 134 U.S. 1 (1890), clarified the language of the amendment to grant states immunity from suit by any person, regardless of what state citizenship they enjoyed. The *Hans* Court expressly rejected the proposition that the eleventh amendment allows a state to be sued by its own citizens under a federal statute. Writing for the majority Justice Bradley stated:

> Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? . . . .
>
> * * *
>
> The suability of a state, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted.

Id. at 15-16.

In order for a damage suit to be brought against a state in federal court, one of two situations must occur. First, Congress, by explicit legislative enactment, may abrogate the state's immunity. *See Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976). The United States Supreme Court has held that section 1983 did not constitute a Congressional abrogation of a state's eleventh amendment immunity. *See Quern v. Jordan,* 440 U.S. 332 (1979); *Edelman v. Jordan,* 415 U.S. 651 (1974).

The second situation arises when the state itself consents to be sued in federal court, thereby waiving its eleventh amendment immunity. The United States Supreme Courty [sic] in *Edelman,* stated

> In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."

415 U.S. at 673 (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909).

With this background, we then consider whether a civil right suit under 42 U.S.C. §1983 can be brought against the state and one of its agencies in a Florida court. Hill correctly points out that the eleventh amendment immunity is inapplicable because it pertains only to suits filed in federal court. Hill contends first that the state has no common law immunity against a suit brought under federal law alleging the violation of a federal constitutional right. We reject this argument.

At the outset, we note that even though *Quern* was a federal court action involving the eleventh amendment, the United States Supreme Court made the statement in that case that Congress, in enacting section 1983, did not intend "to override the traditional sovereign immunity of the States." 440 U.S. at 341. Moreover, this position has also been adopted by a number of courts throughout the country.

In *Ramah Navajo School Board v. Bureau of Revenue,* 104 N.M. 302, 720 P.2d 1243 (N.M. App.). *cert. denied,* 107 S.Ct. 423 (1986), the court addressed the question by first explaining:

> Sovereign immunity and Eleventh Amendment immunity are, of course, distinct concepts, but both immunities are designed to protect the same object—state government. *Civil Actions Against State Government: Its Division, Agencies and Officers* (Winborne, ed. 1982). The Eleventh Amendment shields the operation of state governments from intrusions from the federal judiciary while sovereign immunity protects state government affairs from interference by plaintiffs and state courts. *Id.* Therefore, when a Section 1983 suit is brought in federal court, the court analyzes whether the defendant is a "person" within the meaning of Section 1983 or, more meaningfully expressed, whether the Eleventh Amendment bars the suit from being brought against that defendant. Similarly, in Section 1983 actions brought in state courts, the court determines whether sovereignty immunity bars the suit. *Gumbhir v. Kansas State Board of Pharmacy.*

104 N.M. at 307, 720 P.2d at 1248. The court then reasoned that since Congress in enacting section 1983 did not intend to destroy the state's eleventh amendment immunity from suits brought in federal court, its logically followed that Congress also did not intend to abrogate the state's sovereign immunity from section 1983 suits brought in state courts.

In concluding that the State of Michigan retained sovereign immunity with respect to section 1983 actions, the court in *Karchefske v. Department of Mental Health,* 143 Mich. App. 1, 371 N.W.2d 876 (1985), stated:

Clearly, the sovereign immunity of the states was well established at common law at the time that §1983 was enacted. Furthermore, we are convinced that state immunity was supported by such strong policy reasons that "Congress would have specifically so provided had it wished to abolish the doctrine." *Owen v. City of Independence,* 445 U.S. 622, 637, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), quoting *Pierson v. Ray, supra,* 386 U.S. p. 555, 87 S.Ct. p. 1218.

In considering the policy supporting sovereign immunity of the states from liability in their own courts, we find a compelling analogy in the Eleventh Amendment, even though the latter provision on its face governs the federal judicial power. The Eleventh Amendment is "but an exemplification" of the fundamental rule that "a State may not be sued without its consent". *Ex parte State of New York No. 1,* 256 U.S. 490, 497, 41 S.Ct. 588, 589, 65 L.Ed. 1057 (1921), quoted in *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, ____, 104 S.Ct. 900, 907, 79 L.Ed.2d 67, 77 (1984). Therefore, we would expect the same clarity of Congressional intent to abrogate traditional sovereign immunity as the United States Supreme court demanded (and found lacking) in *Quern, supra,* with respect to Eleventh Amendment immunity.

143 Mich. App. at 8-9, 371 N.W.2d at 881 (footnote omitted).

In *Kapil v. Association of Pennsylvania State College,* 68 Pa. Commw. 287, 448 A.2d 717 (1982), *rev'd on other grounds,* 504 Pa. 92, 470 A.2d 482 (1983), the court said:

> It would seem that one of the most "traditional" dimensions of state sovereign immunity is that which states historically have enjoyed *in their own courts* from most suits for money damages. In any event, that dimension of state sovereign immunity clearly preexisted Section 1983 of the federal Civil Rights Act.
>
> Given the *Quern* construction of Section 1983, it follows that a state's sovereign immunity, from a Section 1983 damage action, is not solely that immunity which the 11th amendment of the federal Constitution provides as to such suits in federal courts. Rather, a state's "traditional" sovereign immunity, to the extent that the state has preserved it, would also bar a Section 1983 damage action in the state's own courts. . . . Thus, a state's own courts may not entertain such an action against a state or its agencies, unless the state has in that respect waived its sovereign immunity.

68 Pa. Commw. at 292-93, 448 A.2d at 720-21 (emphasis in original). *Accord De Bleecker v. Montgomery County,* 292 Md. 498, 438 A.2d 1348 (1982); *Woodbridge v. Worcester State Hospital,* 384 Mass. 38, 423 N.E.2d 782 (1981); *Kristensen v. Strinden,* 343 N.W.2d 67 (N.D. 1983).

Thus, we hold that the common law immunity of the state of Florida and its agencies has not been abrogated by 42 U.S.C. §1983. However, just as in cases involving the eleventh amendment, it is also necessary to consider whether there has been a waiver of sovereign immunity. Florida's statute on waiver of sovereign immunity is section 768.28, Florida Statutes, which provides, in pertinent part:

> (1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. . . .
>
> * * *

(5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $200,000. . . .

* * *

(9)(a) No officer, employee, or agent of the state or its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injuries or damages suffered as a result of any act, event, or omission of action in the scope of his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. . . . The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of his employment or

> committed in bad faith or with malicious purpose *or in a manner exhibiting* wanton and willful disregard of human rights, safety, or property.

The question of whether section 768.28 constituted a waiver of Florida's eleventh amendment immunity against suit in federal court under 42 U.S.C. §1983 was addressed by the United States District Court for the Northern District of Florida in *Shinholster v. Graham,* 527 F.Supp. 1318 (N.D. Fla. 1981). After a complete analysis of section 768.28 and its legislative history, the court concluded:

> [T]he State of Florida has not statutorily waived its Eleventh Amendment immunity for itself, nor for any arms of the state, nor for its officers, employees or agents sued in their official capacities . . . . [T]he Florida legislature's intent to limit the waiver of sovereign immunity solely to tort claims and to the exclusion of federal civil rights suits is abundantly clear.

Id. at 1331-32.

This issue was also considered on appeal by the United States Court of Appeals for the Eleventh Circuit in *Gamble v. Florida Department of Health and Rehabilitative Services,* 779 F.2d 1509 (11th Cir. 1986). That court rejected the suggestion that section 768.28 represents a broad waiver of sovereign immunity, finding instead that the abrogation was limited to traditional torts; specifically, those in which the state would be liable if it were a private person. The court concluded:

> The waiver does not constitute consent to suit in federal court under §1983 . . . . [W]e note that the statute consistently refers to "tort action," persons "liable in tort," and the like without any mention that such terms include federal civil rights actions. We agree . . . that §768.28, when viewed alone, was intended to render the state and its agencies liable for damages for traditional torts under state law, but to exclude such liability for "constitutional torts."

Id. at 1515.

We agree with these federal interpretations of our statute and find them fully applicable with respect to whether Florida has waived its common law immunity against civil rights actions filed in state courts. While Florida is at liberty to waive its immunity from section 1983 actions, it has not done so. The recovery ceilings in Section 768.28 were intended to waive sovereign immunity for state tort actions, not federal civil rights actions commenced under section 1983. Accordingly, we answer the certified question in the negative.

New Trial on Damages

We turn next to Hill's claim that the district court erred in ordering a new trial on damages as a result of the allegedly misleading jury instruction and verdict form. The record reflects that the challenged instruction was prepared and submitted by DOC and read at its request upon agreement by both parties. DOC did not object to the instruction at trial, nor did it raise the issue

on a motion for new trial. Rather, DOC attempted later, by a rule 1.540 motion, to secure relief from the final judgment and obtain a new trial. The trial court denied the motion, noting that rule 1.540, which addresses clerical mistakes, fraud, inadvertence, excusable neglect, newly discovered evidence, etc., was an inappropriate vehicle by which to seek relief.

Florida Rule of Civil Procedure 1,470(b), titled "Instructions to Jury," provides:

> Not later than at the close of evidence, the parties shall file written requests that the court charge the jury on the law set forth in such requests. The court shall then require counsel to appear before it to settle the charges to be given. At such conference all objections shall be made and ruled upon and the court shall inform counsel of such general charges as it will give. No party may assign as error the giving of any charge unless he objects thereto at such time or the failure to give any charge unless he requested the same. . . .

We have expressly held that where no objection is made to the form of the verdict, any defect as to form is waived. *See Higbee v. Dorigo,* 66 So.2d 684 (Fla. 1953).

In a similar case concerning a verdict form, the Second District Court of Appeal determined that appellants waived any ambiguities when they failed to object to the form of the verdict. *Rosario v. Melvin,* 446 So.2d 1158 (Fla. 2d DCA 1984). Likewise, the Fifth District Court of Appeal noted in *Keller Industries, Inc.*

v. Mogart, 412 So.2d 950 (Fla. 5th DCA 1982):

> The fault . . . must be placed upon the . . . trial attorney who led the court into error by approving, or failing to object to, the form of the verdict . . . . For all we know . . . trial counsel intentionally, for tactical reasons, chose not to bring the problem to the court's attention.

Id. at 951. It is unrefuted that the allegedly misleading verdict form was agreed to by both parties. We hold its use did not constitute fundamental error and the granting of relief on the basis of rule 1.540 was improper. We note the verdict form was consistent with the dictates of the Florida Standard Jury Instructions and the model verdict forms.

Conclusion

For the reasons expressed, we find Florida has not waived immunity to a federal statutory civil rights claim under 42 U.S.C. §1983 and the district court improperly granted a new trial on damages. Accordingly, we approve that portion of the district court decision finding no waiver of sovereign immunity, but we quash that portion of the decision which orders a new trial on damages.

It is so ordered. (McDonald, C.J., and Shaw, Barkett, Grimes and Kogan, JJ., Concur. Ehrlich, J., Concurs with an opinion.)

(Ehrlich, J., concurring.) I concur with the Court's opinion but wish to add an additional reason why a new trial was improperly granted by the district court.

While the court's instruction was technically in error, the jury was told to determine the total amount of plaintiff's damages and not to "make any reduction because of negligence." The "negligence" aspect of the charge was in error. The jury found DOC liable for false imprisonment and that finding supports the damage award. The further finding that DOC was "75 percent comparatively negligent" cannot be ignored.

* * *

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1986

CASE NO. 85-1488

THE DEPARTMENT OF CORRECTIONS
OF THE STATE OF FLORIDA,

Appellant,

vs.

JESSE HILL,

Appellee.

Opinion filed May 6, 1986.

On Appeal from the Circuit Court for Dade County, Joseph P. Farina, Judge.

William A. Meadows, Jr. and Charles F. Mills, for appellant.

Lisk & Ormond and Gregg Ormond; Haggard & Kirkland, for appellee.

Before SCHWARTZ, C. J., and BARKDULL and NESBITT, JJ.

PER CURIAM.

The Department of Corrections (D.O.C.) appeals from a jury verdict awarding the plaintiff (Hill) $750,000.00. D.O.C. contends that the trial court erred by giving the jury a misleading instruction and verdict forms. We affirm in part and reverse in part.

Following a trial on the issues of liability and damages, the jury returned a verdict in the above stated amount finding that D.O.C. had falsely imprisoned Hill and was 75% comparatively negligent. Hill was found 25% comparatively negligent. An instruction at the end of the verdict form read:

> In determining the total amount of damages, do not make any reduction because of negligence, if any of plaintiff Jesse Hill. If you have found Jesse Hill negligent in any degree, the court in entering judgment will reduce Jesse Hill's total amount of damages (100%) by the percentage of negligence which you found is chargeable to Jesse Hill.

This same instruction was read aloud by the court to the jury prior to their deliberations.

Following the publication of the verdict, the court entered a judgment for the total amount of damages, $750,000.00. D.O.C. requested that the judgment be reduced by Hill's percentage of comparative negligence. The court denied this request, reasoning that comparative negligence is not a defense to false imprisonment.

D.O.C. contends that the instruction given by the court and written at the end of the verdict forms misled the jury to the prejudice of D.O.C. We agree that the result of these instructions was prejudicial to D.O.C., *see, ITT-Nesbitt, Inc. v. Valle's Steak House, Inc.*, 395 So.2d 217 (Fla. 4th DCA 1981) (the test for misleading jury instructions is whether, under the particular facts of the case, the instructions could have misled the jury or prejudiced a party's right to a fair trial); *American National Bank v. Norris*, 368 So.2d 897 (Fla. 1st DCA 1979) (same); *Lafleur v. Castlewood International Corp.*, 294 So.2d 21 (Fla. 3d DCA 1974) (same); *see also Staff v. Soreno Hotel Co.*, 60 So.2d 28 (Fla. 1952) (court may not mislead a jury in outlining the issues that body is to try); and these instructions tended to confuse rather than enlighten the jury on the issue of damages. *Veliz v. American Hospital, Inc.*, 414 So.2d 226, 228 (Fla. 3d DCA 1982) (an instruction which tends to confuse is cause for reversal if it may have misled the jury).

The lower court was correct in ruling that Hill's comparative negligence is not a defense to false imprisonment, *see Mazzilli v. Doud*, 11 F.L.W. 732 (Fla. 3d DCA Mar. 25, 1986) (comparative negligence is not a defense to an intentional tort); *Honeywell, Inc. v. Trend Coin Co.*, 449 So.2d 876, 879 (Fla. 3d DCA 1984) (same); *reversed on other grounds*, 11 F.L.W. 75 (Fla. Feb. 27, 1986), and therefore D.O.C. is liable for the full amount of any damages caused by its false imprisonment of Hill. In the present case, however, the jury was misled by instructions on the reduction of damages. Accordingly, we reverse for a new trial on the damages resulting from the false imprisonment, without consideration of the negligence of either party. *See Besett v. Basnett*, 437

So.2d 172 (Fla. 2d DCA 1983) (double recovery based upon the same element of damages, in this case fraud and negligence, is prohibited).

Hill cross-appeals the dismissal of his 42 U.S.C. § 1983 civil rights claim. We affirm the lower court's dismissal on the authority of *Skoblow v. Ameri-Manage, Inc.*, 483 So.2d 809 (Fla. 3d DCA 1986), where we held that, for purposes of 42 U.S.C. § 1983, the state has not waived sovereign immunity. D.O.C. is a state agency and, therefore, enjoys state sovereign immunity. Thus, the dismissal of Hill's civil rights claim was proper.

This case is affirmed in part, reversed in part and remanded for a new trial as to damages for false imprisonment.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1986

CASE NO. 85-1488

THE DEPARTMENT OF CORRECTIONS
OF THE STATE OF FLORIDA,

Appellant,

vs.

JESSE HILL,

Appellee.

Opinion filed June 17, 1986.

On Appeal from the Circuit Court for Dade County, Joseph P. Farina, Judge.

William A. Meadows, Jr. and Charles F. Mills, for appellant.

Lisk & Ormond and Gregg Ormond; Haggard & Kirkland, for appellee.

Before SCHWARTZ, C. J., and BARKDULL and NESBITT, JJ.

ON MOTION FOR REHEARING AND CERTIFICATION

PER CURIAM.

Hill's motion for certification is granted and we certify to the Supreme Court of Florida the question certified by the First District Court of Appeal in *Spooner v. Department of Corrections*, 11 F.L.W. 1157 (Fla. 1st DCA May 19, 1986):

> Has the State of Florida, pursuant to section 768.28, Florida Statutes (1983), waived its Eleventh Amendment and state common law immunity and consented to suits against the State and its agencies under 42 U.S.C. Section 1983?

Hill's motion is otherwise denied.